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Brown v. Pro Football, Inc.: You Make the Call

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Casenotes

BROWN v. PRO FOOTBALL, INC.: YOU MAKE THE CALL!

I. INTRODUCTION

Imagine overtime at the Super Bowl, where the first team to score wins. It is first and ten, the ball is snapped, the quarterback throws it to the receiver; but wait, the defensive player pulled the receiver's jersey over his head. The defensive player intercepts the ball, and runs for a ninety yard touchdown. No penalty is called.

In 1997, professional sports involve not only the game played on the field, but also an off-the-field game played between players and owners.[1] In the past twenty years, courts have heard numerous claims from both players and owners alleging antitrust law violations.[2] These claims usually stem from the collective bargaining process.[3] In the collective bargaining process, teams are supposed to meet on neutral ground with their own bargaining power and

1. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339.

2. *See* National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995) (holding that nonstatutory labor exemption precluded antitrust challenge to continued imposition of terms of expired collective bargaining agreement, after impasse was reached in negotiations); Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989) (holding that nonstatutory labor exemption from antitrust laws extends beyond impasse); Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (stating that prohibition in collective bargaining agreement on player corporations could not be challenged on antitrust grounds); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (concluding that nonstatutory labor exemption applies where term of employment was incorporated into collective bargaining agreement as result of good faith, arm's length bargaining); Smith v. Pro Football, 420 F. Supp. 738 (D.D.C.), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978) (finding football league actions anti-competitive and unreasonable, and therefore subject to antitrust liability); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, NFL v. Mackey, 434 U.S. 801 (1977) (holding that nonstatutory labor exemption cannot be involved where agreement is not product of bona fide negotiations); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987) (finding that restrictions in collective bargaining agreement do not lose their antitrust immunity upon expiration of the agreement, but may not be continued indefinitely by employer following expiration of collective bargaining agreement); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (holding league was not entitled to advantage of labor exemption from antitrust laws).

3. For a list of cases involving such claims, see *supra* note 2 and accompanying text.

with their own strategies to use in bargaining with the other side.[4] The object of the game is to reach an agreement.[5] Both sides are fighting for their terms and conditions in the new collective bargaining agreement.[6] What happens, though, if one team pulls the other teams' jerseys over their heads? Is that a penalty? Or is that a legitimate action?

Recently, the United States Supreme Court, in *Brown v. Pro Football, Inc.*,[7] held that team owners could lawfully impose unilateral restraints on the players (pull the jersey over their heads), after collective bargaining reached impasse (overtime), thereby winning the collective bargaining game. The players claimed that this unilateral imposition of restraints violated antitrust law.[8] The Supreme Court held, however, that the nonstatutory labor exemption is applicable after bargaining reaches impasse, and therefore, the owners actions were lawful.[9]

This Note discusses the *Brown v. Pro Football, Inc.*[10] decision in light of the nonstatutory labor exemption and its applicability in the collective bargaining process. Section II describes the history of the nonstatutory labor exemption, and its evolution from the time Congress enacted the antitrust laws until the recent *Brown* deci-

4. *See* The National Labor Relations Act, 29 U.S.C. § 158 (1994) (stating that employees have right to bargain collectively). Under the National Labor Relations Act it is considered an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158. Section 157 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157.

5. *See* 29 U.S.C. § 141 (1994). Under §141:

> Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

Id.

6. *See id.*

7. 116 S. Ct. 2116 (1996).

8. *See id.* For a discussion on impasse, see *infra* note 61 and accompanying text concerning free market and competition in the antitrust laws.

9. *See id.* The court held that the employers imposition of unilateral restraints on the players, after negotiations reached impasse, was not a violation of the antitrust laws because the nonstatutory exemption was still applicable. *See id.* at 2120. For a discussion of the nonstatutory labor exemption, see *infra* notes 40-57 and accompanying text.

10. 116 S.Ct. 2116 (1996).

sion.[11] Section III describes the factual background surrounding the *Brown* decision.[12] Section IV discusses the reasoning behind the majority's decision, and sets forth the opposing views of the dissent.[13] Section V examines the *Brown* decision in light of congressional enactments, Supreme Court interpretations of the nonstatutory labor exemption and legislative history.[14] Section VI provides a discussion concerning the impact of the *Brown* decision on the future of the collective bargaining process in general and as applied to professional sports.[15]

II. BACKGROUND

A. Labor Exemption From Antitrust Law

Through the Sherman Antitrust Act of 1890 (Sherman Act) the federal government regulates anti-competitive business behavior.[16] Congress enacted the Sherman Act to regulate trade practices among competitors in interstate commerce.[17] Section 1 of the Sherman Act forbids contracts, combinations or conspiracy in restraint of trade,[18] while section 2 of the Act prohibits monopolization of trade or commerce.[19]

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11. *See infra* notes 16-120 and accompanying text.

12. *See infra* notes 121-132 and accompanying text.

13. *See infra* notes 133-192 and accompanying text.

14. *See infra* notes 193-215 and accompanying text.

15. *See infra* notes 216-221 and accompanying text.

16. *See* Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (1988)) [hereinafter *Sherman Act*]. *See also* Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614, 635 (1985) (holding that Congress enacted Sherman Act to promote competitive economy); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) (holding that Sherman Act was "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade"); Fishman v. Estate of Wirtz, 807 F.2d 520, 536 (7th Cir. 1986) (stating that Court has instead stressed that antitrust laws seek to protect competition); LAURENCE SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 14 (1977) (stating that "general objective of the antitrust laws is the maintenance of competition").

17. *See* SULLIVAN, *supra* note 16, at 136 (stating "[c]onduct tending to raise barriers can be recognized as conduct which facilitates the achievement of monopoly."). *See also* HERBERT HOVENKEMP, ECONOMICS & FEDERAL ANTITRUST ANALYSIS, 142-45 (1985) (discussing monopolization and requirements to prove certain conduct is monopoly power).

18. 15 U.S.C. § 1 (1988). Section 1 of the Sherman Act provides: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.*

19. 15 U.S.C. § 2 (1988). Section 2 of the Sherman Act provides: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons . . . shall be deemed guilty of a felony." *Id.*

In response to consequences stemming from the application of the Sherman Act on labor activities,[20] Congress passed the Clayton Act in 1914, which provides that both labor unions and labor activities are protected from the Sherman Act.[21] The Clayton Act is directed toward anti-competitive behavior by individual as well as group competitors.[22] Section 6 of the Clayton Act states that labor is not to be considered commerce, thereby exempting labor unions from antitrust laws.[23] Meanwhile, section 17 of the Clayton Act[24] and the Norris-LaGuardia Act,[25] exempt labor union activities from

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20. *See* Archibald Cox, *Labor and the Antitrust Laws - A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955). The general language of the Sherman Act made it easy for government officials to stop strikes which they considered threatening the public welfare. *See id.* at 256. The United States has successfully argued in the past that a worker's strike was a Sherman Act violation. *See, e.g.*, United States v. Workingmen's Amalgamated Council of New Orleans, 54 Fed. 994, 1000 (C.C.E.D. 1893). The district court held that:

> [t]he evil, as well as the unlawfulness of the act of the defendants, consists in this: that, until certain demands of theirs were compiled with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country.

Id.

21. *See* Clayton Act, ch. 323, § 6 , 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (1994)).

22. *See* Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 808 (1945). The *Bradley* Court held that "[s]ection 6 of the Clayton Act declares that the Sherman Act must not be so construed as to forbid the 'existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help . . . .' But 'the purposes of mutual help' can hardly be thought to cover activities for the purpose of 'employer-help' in controlling markets and prices." *Id.* *See also* Mackey v. National Football League, 543 F.2d 606, 611 (8th Cir. 1976) (concluding that § 6 and § 20 of Clayton Act and Norris-LaGuardia Act are basic sources for labor exemption to antitrust law); Cox, *supra* note 20 at 254 (explaining that "Clayton Act made it plain that the mere formation of a labor union is not an unlawful combination in restraint of trade or commerce.").

23. 15 U.S.C. § 17 (1988). "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations." *Id.*

24. *See id.*

25. *See* Norris-LaGuardia Act, ch. 90, § 4, 47 Stat. 70, 70 (1932) (current version at 29 U.S.C. § 104 (1994)). The Act explicitly formulated the public policy with regard to industrial conflict stating that:

> [w]hereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such

antitrust law and place restrictions on the power of the federal courts to grant injunctions in labor disputes.[26]

B. Statutory Exemption

Though the Clayton Act and Norris-LaGuardia Act do not contain specific language expressing a labor exemption from the Sherman Act, the Supreme Court has interpreted the language of these statutes to waive antitrust liability for unilateral labor conduct, such as boycotts and picketing.[27] This exemption to antitrust laws is known as the *statutory labor exemption.*[28]

The Supreme Court expanded upon the application of the statutory labor exemption in *United States v. Hutcheson*[29] when it held that the Sherman Act, the Clayton Act and the Norris-LaGuardia Act must all be read in conjunction with each other to determine whether a labor union has violated antitrust law.[30] In *Hutcheson,* the employer, Anheuser-Busch, and the carpenters' union were involved in a labor dispute which lead to the carpenters

representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id.

26. *See* National Basketball Ass'n v. Williams, 45 F.3d 684, 689 (2d Cir. 1995) (explaining how Norris-LaGuardia Act barred federal courts from granting injunctions against firms who join employer organizations); California State Council of Carpenters v. Associated Gen. Contractors, 648 F.2d 527, 535 (9th Cir. 1981) *rev'd,* 459 U.S. 1141 (1982) (holding that statutory exemption in § 4 of Norris-LaGuardia Act, when read with § 20 of Clayton Act, exempts from antitrust law those who become members of employer organization); Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports,* 94 COLUM. L. REV. 1045, 1049 (1994) (noting that Norris-LaGuardia Act and Clayton Act create exemption protecting certain union activities from antitrust law).

27. *See* Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975). The Court in *Connell* held that, when read together, the Clayton and Norris-LaGuardia Acts put forth the principle that labor unions do not violate Section 1 of the Sherman Act. *See id.* Further, the Court found that specific union activities, such as boycotts and picketing, were also exempt. *See id. See also* United States v. Hutcheson, 312 U.S. 219, 230 (1941) (holding that § 20 of Clayton Act puts forth enumerated labor union activities which are not subject to Sherman Act). In *Hutcheson,* the majority held that as long as the union acts in its self-interest and is not combined with a non-labor group, this combination of employees is not subject to the Sherman Act, regardless of the objective. *See id. See generally,* Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption,* 104 HARV. L. REV. 874, 877 (1991) (explaining statutory labor exemption was established in order to advance labor policy).

28. *See* Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption,* 104 HARV. L. REV. at 877. The Supreme Court has interpreted the Clayton Act and the Norris-LaGuardia Act to have created a statutory labor exemption from antitrust law for unions. *See id.*

29. 312 U.S. 219 (1941).

30. *See id.* at 231. The *Hutcheson* Court held that these three statutes should be read "as a harmonizing text of outlawry of labor conduct." *Id.*

strike.[31] The carpenters attempted to persuade members of other unions not to do work for Anheuser-Busch.[32] The carpenter's union was charged with engaging in union activities in violation of sections one and two of the Sherman Act.[33] The carpenters argued that they were exempt from antitrust laws under the statutory labor exemption.[34] Recognizing congressional intent to protect labor unions from antitrust law through the Clayton and Norris-LaGuardia Acts, the Court held that the carpenters' actions were protected from antitrust liability under the statutory labor exemption.[35]

The Supreme Court confronted the statutory labor exemption again in *Allen Bradley v. Local Union No. 3*,[36] and held that it was a violation of the Sherman Act for a labor union and its members to combine with manufacturers to restrain competition.[37] The Court, following its decision in *Hutcheson*,[38] held that the statutory labor

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31. *See id.* at 228. Anheuser-Busch, a manufacturer, rejected the carpenters' demand for exclusive rights to all jobs involving the erecting and dismantling of machinery. *See id.* Anheuser-Busch refused the carpenters' demand and the carpenters, refusing to arbitrate, went on strike. *See id.*

32. *See id.* The carpenters attempted to dissuade the other unions through picketing and written correspondence. *See id.*

33. *See id.* (citing 15 U.S.C. § 1, 2).

34. *See Hutcheson*, 312 U.S. at 228. The carpenters' union filed demurrers denying that their actions violated antitrust law. *See id.*

35. *See id.* at 236. The Court looked at the legislative history of the Norris-LaGuardia Act and the Clayton Act. *See id.* at 235. The Court noted that the House Committee on the Judiciary stated "'[t]he purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act.'" *Id.* (quoting H. REP. No. 669, 72d Cong., 1st Sess., 3 (March 2, 1932)). In conclusion, the Court held that:

> [t]he Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

Id. at 236.

36. 325 U.S. 797 (1945).

37. *See id.* at 812-13. The union, using conventional labor union methods, attempted to expand employment opportunities for its members. *See id.* at 798-99. The union used tactics such as boycotts to get all the contractors and manufacturers in the city to agree to closed-shop agreements. *See id.* Under these agreements the contractors agreed to purchase equipment from only those manufacturers who had closed-shop agreements with the union. *See id.* Inevitably, the union and the manufacturers "stifled the competition,"causing manufacturers outside the city, who lacked closed-shop agreements with the union, to file a suit claiming that the union had violated antitrust law. *See id.*

38. 312 U.S. 219 (1941). For a discussion of *Hutcheson*, see *supra* notes 29-35 and accompanying text.

exemption is not automatic, but rather is conditioned upon the union's actions.[39]

C. Nonstatutory Labor Exemption

The Supreme Court, while establishing the statutory labor exemption for unilateral collective bargaining tactics,[40] also established a *nonstatutory labor exemption* that immunizes from antitrust laws the results of the collective bargaining process between unions and employers.[41] The Court realized the need for a nonstatutory labor exemption as a result of the conflict between the congressional policy favoring collective bargaining under the National Labor Relations Act[42] (NLRA) and the congressional policy favoring free competition in business under the Sherman Act.[43] The nonstatutory labor exemption protects both unions and employers from antitrust law challenges to certain results of the collective bar-

39. *See Allen Bradley*, 325 U.S. at 810. The Court held that "the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." *Id.* *See also* United Mine Workers of America v. Pennington, 381 U.S. 657, 662 (1965) (citing United States v. Hutcheson, 312 U.S. 219 (1941)) (holding statutory exemption did not apply when union and non-union group tried to prevent competition from others); Jonathon C. Latimer, *The NBA Salary Cap: Controlling Labor Costs Through Collective Bargaining*, 44 CATH. U.L. REV. 205, 212 (Fall 1994) (explaining that *Hutcheson* Court intended statutory exemption apply to union activities, so long as union does not join with non-union group).

40. *See* Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 877 (1991) ("[t]he statutory labor exemption immunizes certain agreements essential to the structure and economic warfare of the collective bargaining process: the agreements among employees to organize a union, to make coordinated proposals, and to engage in 'unilateral' collective tactics such as strikes (or lockouts).").

41. *See id.* at 877-78 (stating "nonstatutory exemption protects union-employer agreements that standardize wages and working conditions; these agreements are the usual result of collective bargaining."); *see e.g.*, Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965) (finding nonstatutory labor exemption applicable to multi-union/multi-employer agreement concerning closing food stores at specific times).

42. 29 U.S.C. § 158 (as amended 1994). The NLRA states that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . ." *Id.*

43. *See* Connell Constr. Co. v. Plumbers Local Union No. 100, 421 U.S. 616, 622 (1975). The *Connell* Court recognized the conflict between the congressional policy favoring collective bargaining and the congressional policy favoring free competition in business markets. *See id.* The Court held the nonstatutory exemption as the proper accommodation to balance these two conflicting interests. *See id.* *See also* United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965) (holding that nonstatutory labor exemption for union-employer agreements is necessary to reconcile Sherman Act and labor laws).

gaining process.[44] Although the Court has recognized this nonstatutory labor exemption to antitrust laws, it has not set the exemption's parameters; rather it has only established the exemption's general boundaries.[45]

The Supreme Court defined one of the boundaries to the nonstatutory labor exemption in *United Mine Workers v. Pennington.*[46] In *Pennington,* the Supreme Court decided whether an agreement between a labor union and large coal mine operators that secured uniform labor standards in the mining industry was exempt from antitrust law.[47] The Court found that the nonstatutory labor exemption to antitrust laws did not apply to the agreement between the union and industry operators even though the agreement included wage standards.[48] The *Pennington* Court concluded that a union forfeits its nonstatutory labor exemption when it conspires to eliminate competitors from an industry.[49] The Supreme Court fur-

44. *See e.g.,* Powell v. National Football League, 930 F.2d 1293, 1303 (8th Cir. 1989) (holding that nonstatutory exemption is applicable in agreements negotiated in collective bargaining); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3d Cir. 1974) (stating that "[c]ongress has seen fit to grant labor unions a limited exemption from antitrust liability . . . . Provided that unions act in their own self-interest in an area which 'is a proper subject of union concern.'"). For further discussion concerning exemption in collective bargaining, see *supra* note 37-39 and accompanying text.

45. *See* Lock, *supra* note 1, at 352. The scope of the exemption is not defined. *See id.* The Supreme Court has established certain minimal requirements of a collective bargaining agreement that will be exempt from antitrust laws, but these decisions do not set forth a general standard for applying the exemption. *See id.* (citing Connell Constr. v. Plumbers Local Union No. 100, 421 U.S. at 622-23; *Jewel Tea,* 381 U.S. at 664-66)). *See also Jewel Tea,* 381 U.S. at 679 (determining union-employer contract concerning amount of working hours is exempt from antitrust liability); United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965) (holding that agreement between union and manufacturers "to secure uniform labor standards throughout the industry . . . was not exempt from the antitrust laws"); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945) (concluding that unions are not exempt from antitrust law when they join with employers to restrain competition and monopolize market).

46. 381 U.S. 657 (1965).

47. *See id.* The mine workers sued the owners of the coal company for royalty payments due them under the National Coal Wage Agreement of 1950. *See id.* at 659. The owners cross claimed for damages alleging that the mine workers violated antitrust laws by taking steps to exclude the marketing, production and sale of non-union coal. *See id.* at 660.

48. *See id.* at 665. The union argued that the nonstatutory labor exemption was applicable since the agreement between the union and industry operators included wages, a mandatory bargaining subject under the NLRA. *See id.* at 664. The Court, however, concluded that a union is not automatically exempt under the nonstatutory labor exemption simply because negotiations involved an aspect of labor that is protected under the NLRA. *See id.* Therefore, the court found that the exemption did not protect the agreement from antitrust suit. *See id.*

49. *See id.* at 665-66. The Court held that there is nothing in labor relations policy "indicating that the union and the employers in one bargaining unit are

ther clarified the boundaries of the nonstatutory labor exemption in *Amalgamated Meat Cutters v. Jewel Tea.*[50] The Court held that a provision restricting marketing hours, which was established through an agreement between the union and the meat retailers, was exempt from antitrust liability under the nonstatutory labor exemption.[51] The Court balanced the interests of the NLRA and the union against the impact of the working hours agreement on the product market.[52] The Court concluded that the time restrictions agreement, which was a result of bona fide bargaining, did not have a sufficient impact on the product market to cause the forfeiture of the nonstatutory labor exemption.[53] Thus, the Court held that the agreement was exempt from antitrust liability.[54]

More recently in *Connell Construction Co. v. Plumbers & Steamfitters Local Union 100,*[55] the Supreme Court held that the nonstatutory labor exemption is not applicable where a union imposes direct restraints on competition by forcing contractors to subcontract work only to firms that have collective bargaining agreements with the union.[56] The Court found that the agreement was a direct restraint on free market competition and that these substantial anticompetitive effects, created by the agreement, would not follow nat-

free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." *Id.* at 666.

50. 381 U.S. 676 (1965).

51. *See id.* The union and meatcutter employers agreed in the collective bargaining agreement to limit the amount of hours in the day during which they would sell fresh meat. *See id.* at 680. Jewel Tea was one of the employers who did not sign the agreement. *See id.* Jewel Tea voiced its contradicting opinion about the selling restrictions and made a counteroffer that included Friday night operations in addition to the other selling times agreed upon. *See id.* The offer was rejected by the union, which then proceeded to strike against Jewel Tea. *See id.* at 681. Under duress from the union strike, Jewel Tea signed the agreement between the union and the other employers. *See id.* Jewel Tea then brought suit against the union, alleging a violation of the Sherman Act through the conspiracy to implement the retail meat selling time restrictions. *See id.*

52. *See id.* at 689-90.

53. *See id.* at 691. The Court determined that the national labor policy expressed in the National Labor Relations Act "places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work." *Id.*

54. *See id.* at 734. The Court held that "Jewel's argument — when considered against the historical background of union concern with working hours and operating hours and the virtually uniform recognition by employers of the intimate relationship between the two subjects . . . — falls far short." *Id.*

55. 421 U.S. 616 (1975).

56. *See id.* at 635. The union asked Connell to only subcontract work to firms that had a contract with the union. *See id.* at 619. When Connell refused, the union picketed in front of Connell's construction sites. *See id.* Connell signed the agreement with Local 100, but then sought a declaration from the appellate court that the agreement was invalid because it violated antitrust law. *See id.*

urally from the elimination of competition based on wages and working conditions.[57]

D. The NLRA

After the passage of the Clayton Act and Norris-LaGuardia Act, Congress enacted the National Labor Relations Act, which encourages the practice of collective bargaining between employers and employees.[58] The NLRA requires "the mutual obligation of the employers and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[59] The NLRA's collective bargaining requirement is bilateral, protecting both employers and unions.[60] While protecting both parties, the NLRA provides unions protection against the unilateral action of an employer from the commencement of negotiations until impasse is reached.[61] The NLRA requires good faith bargaining, but "does not compel either party to agree to a proposal or require the making of a concession."[62] Additionally, the Supreme Court has stated that the role of the National Labor Relations Board (NLRB) under the NLRA is "to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties."[63]

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57. *See id.* at 623-25. The Court held that Local 100 had no interest in representing Connell's employees. *See id.* Therefore, the federal policy favoring collective bargaining offered no shelter for the union's coercive action against Connell. *See id.* at 626.

58. *See* 29 U.S.C. § 158 (1994). For a discussion of the NLRA, see *supra* note 4 and accompanying text. *See also* NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 489 (1960) (concluding that collective bargaining is policy of NLRA).

59. 29 U.S.C. § 158(d).

60. *See* NLRB v. Washington Alum. Co., 370 U.S. 9 (1962) (holding that unions may strike). The NLRA provides that "[n]othing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike." 29 U.S.C. § 163 (1994). *See also* American Ship Bldg. Co., v. NLRB, 380 U.S. 300, 310-11 (1965) (stating that employers may lock out workers).

61. *See* Southwestern Steel & Supply, Inc. v. NLRB, 806 F.2d 1111, 1113 (D.C. Cir. 1986). *See also* Ethan Lock, Powell v. National Football League*: The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U.L. REV. 135, 148 (1990) (defining "impasse"as meaning "that the bargaining process, intended to be protected by the exemption, has stopped"). The point of impasse is significant because at that point the employer is permitted to impose restraints upon employees that were negotiated in the pre-impasse bargaining process. *See id.* The imposed restraint is actually a "unilateral rule"forced on the employee. *See id.*

62. 29 U.S.C. § 158(d) (1994).

63. H.K. Porter v. NLRB, 397 U.S. 99, 108 (1970). The Supreme Court held that the National Labor Relations Board (NLRB) has the duty of carrying out the policies of the NLRA. *See id.* The Court emphasized that "allowing the Board to

E. The Sherman Act

The purpose of the Sherman Act is to promote competition.[64] Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal."[65] Further, Section 1 of the Sherman Act forbids monopolies.[66] The Sherman Act read literally "would condemn many legitimate and necessary business activities."[67] The Supreme Court, however, held that Section 1 of the Sherman Act forbids only those restraints of trade that are deemed to be "unreasonable."[68] The Supreme Court has implemented two separate standards in deciding whether a particular restraint on trade is unreasonable: the per se rule and the rule of reason.[69]

Under the per se rule, labor practices that are inherently unreasonable restraints of trade will be invalidated.[70] Under the rule of reason, a court engages in a more thorough examination of the labor practice in question, and "considers the history and economics of the relevant industry against the reasonableness of the restraint of trade."[71] If a restraint of trade fails the per se test, further examination of the labor practice is not necessary.[72]

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compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the terms of the contract." *Id.*

64. *See* Lock, *supra* note 1, at 343 (discussing Sherman Act as promoting competition); *see also supra* note 16 and accompanying text (discussing protective character of Sherman Act).

65. 15 U.S.C. § 1 (1988).

66. *See* 15 U.S.C. § 2.

67. Lock, *supra* note 1, at 343.

68. Standard Oil v. United States, 221 U.S. 1, 62 (1911). The Supreme Court concluded that the Sherman Act was intended to prevent unreasonable restraints of trade. *See id.*

69. *See id.*

70. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). The Court held that the per se rule invalidates certain restraints which are inherently unreasonable. *See id.* The Court defined the per se rule as: "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 518. *See also* SULLIVAN, *supra* note 16, at 192-94 (discussing power, purpose and effect of per se rule analysis).

71. Latimer, *supra* note 39, at 219 (explaining that if restraint has clear economic necessity causing indirect effect on trade, then restraint will be found reasonable).

72. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 893 (S.D.N.Y. 1975) (holding that some practices are so anti-competitive that they fail per se test, and courts therefore do not need to apply rule of reason test); *see* Northern Pac.

F. Antitrust and Professional Sports

Professional sports presents a distinct challenge to antitrust law.[73] In the early stages of litigation involving the professional sports industry, the owners argued against the application of the per se rule to professional sports restraints.[74] The owners argued that the per se rule was inapplicable to the unique situation of professional sports because of the economic interdependence among the teams, and that it was necessary and reasonable, under the rule of reason, that the owners control the movement of players within the league.[75]

1. *Nonstatutory Labor Exemption and Professional Sports*

Due to the special relationship between owners and players in the professional sports industry, courts have encountered difficulties applying the rule of reason and the per se rule.[76] In *Mackey v. NFL*,[77] the United States Court of Appeals for the Eighth Circuit rejected the per se rule, and laid out a three prong test applicable to cases involving the professional sports industry.[78] Since *Mackey*, courts have adopted the *Mackey* test as the standard in conflicts in-

Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (holding per se rule presumes certain restraints are unreasonable).

73. *See* Corcoran, *supra* note 26, at 1053.

74. *See e.g.*, Mackey v. National Football League, 407 F. Supp. 1000, 1002 (D. Minn. 1976) (discussing how National Football League (NFL) argued "Rozelle Rule"was reasonable restraint on trade), *modified*, 543 F.2d 606 (8th Cir. 1976). *See also* J. WEISTART & C. LOWELL, THE LAW OF PROFESSIONAL SPORTS 594-95 (1979) (discussing arguments for and against per se standard in sports).

75. *See* SPORTS ILLUSTRATED, May 1, 1972, at 62. *See also* Lock, *supra* note 1, at 345 (discussing unique aspects of competition in sports industry). Competition within the sports industry differs from that of other industries. *See* Lock, *supra* note 1, at 345. Sports teams in a league profit from each other. *See id.* If the teams within a league compete with each other for the best players, with no restrictions on price, the constant outbidding of each team to provide the most money for the best players will cause the league as a whole to suffer. *See id.* The increase in cost to the teams would fall onto the fans, which would inevitably cause the owners and the league to diminish in quality. *See id.* The sports industry provides entertainment to the fans, and it requires that all teams work together to make a profit because one team can not survive without the other teams in the league. *See id. See e.g.*, United States v. National Football League, 116 F. Supp. 319 (E.D. Pa. 1953) (holding professional sports teams cannot compete in same sense that other industries compete).

76. *See* Mackey v. United States, 543 F.2d 606 (8th Cir. 1976).

77. *Id.*

78. *See id.* at 614. The three prong test used in determining whether the exemption applies is as follows: 1. the restraint must primarily affect only those parties to the collective bargaining relationship; 2. the agreement considered for exemption must concern a mandatory subject of collective bargaining; and 3. the agreement must be a product of bona fide arm's length bargaining. *See id.*

volving professional sports.[79] The *Mackey* court concluded that for the nonstatutory labor exemption to apply, a term of employment placed on the players by the owners must have been negotiated in collective bargaining.[80] Thus, while the *Mackey* court established a standard for applying the exemption, it did not decide how long the term of employment remains past the collective bargaining agreement's expiration.[81]

2. *Nonstatutory Labor Exemption After Collective Bargaining Agreement Expires*

The Supreme Court has never addressed the issue of whether the nonstatutory labor exemption applies to terms of employment after the collective bargaining agreement has expired and negotiations have reached impasse.[82] The Circuit Courts of Appeal are divided on this issue of when the nonstatutory labor exemption should expire.[83]

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79. *See e.g.*, Powell v. National Football League, 930 F.2d 1293, 1298 (8th Cir. 1989) (applying *Mackey* framework with respect to nonstatutory labor exemption); McCourt v. California Sports, Inc., 600 F.2d 1193, 1198 (6th Cir. 1979) (recognizing *Mackey* as standard to be applied in collective bargaining/antitrust law issue); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 965 (D.N.J. 1987) (stating *Mackey* is correct starting point in nonstatutory labor exemption analysis); Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984) (applying *Mackey* to nonstatutory labor exemption dispute).

80. *See Mackey*, 543 F.2d at 623.

81. *See id.*

82. *See* Corcoran, *supra* note 26, at 1059.

83. *See* National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995) (holding nonstatutory labor exemption precluded antitrust challenge to continued imposition of terms of expired collective bargaining agreement after impasse was reached in negotiations); Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989) (holding that nonstatutory labor exemption from antitrust laws extends beyond impasse); Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (stating prohibition in collective bargaining agreement on player corporations could not be challenged on antitrust grounds); McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (concluding nonstatutory labor exemption applies when term of employment was incorporated into collective bargaining agreement as result of good faith, arm's length bargaining); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987) (finding restrictions in collective bargaining agreement do not lose their antitrust immunity upon expiration of agreement, but may not be continued indefinitely by employer following expiration of collective bargaining agreement); Smith v. Pro Football, 420 F. Supp. 738 (D.C. Cir. 1978) (finding football league actions anti-competitive and unreasonable, and therefore subject to antitrust liability); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (holding nonstatutory labor exemption cannot be involved where agreement is not product of bona fide negotiations); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (concluding that application of exemption depends on subjects of bargaining in dispute).

In *Wood v. National Basketball Association*,[84] the U.S. Court of Appeals for the Second Circuit dismissed a player's antitrust claim challenging certain provisions of a collective bargaining agreement between the National Basketball Association and National Basketball Players Association.[85] The court found that the challenged provisions were mandatory subjects of collective bargaining, and were protected by the nonstatutory labor exemption.[86]

Two years after the Second Circuit's decision in *Wood*, the United States Court of Appeals for the Eighth Circuit, in *Powell v. National Football League*,[87] was faced with the issue of whether the nonstatutory labor exemption extends beyond impasse.[88] In *Powell*, professional football players brought an antitrust action against the professional football league claiming that the league violated antitrust law when it continued to enforce the terms of the expired collective bargaining agreement.[89] The court stated that it was influenced by commentators who suggested that a dispute such as the one brought before the court should be resolved free of intervention by the courts.[90] The court concluded that the League and the

84. 809 F.2d 954 (2d Cir. 1987).

85. *See id.* at 955. The plaintiff alleged that the salary cap, college draft and prohibition of player corporations violated antitrust law. *See id.* The Court of Appeals for the Second Circuit affirmed the Southern District of New York's decision and dismissed the action. *See id.*

86. *See id.* at 962. The court held that the challenged provisions (the salary cap, college draft and prohibition of player corporations) were mandatory subjects of collective bargaining under 29 U.S.C. § 158(d). *See id.* The court concluded that the provisions were "intimately related to wages, hours, and other terms and conditions of employment." *Id.* For a discussion of the mandatory terms of collective bargaining, see *supra* note 59 and accompanying text.

87. 930 F.2d 1293 (8th Cir. 1989).

88. *See id.* at 1307. For a discussion on impasse, see *supra* note 61.

89. *See id.* at 1295. In 1977, the players and the league entered into a collective bargaining agreement that included new rules to govern veteran free agents. *See id.* The new system was called the "First Refusal/Compensation"system. *See id.* This new rule mandated that if a veteran free agent was offered a deal from another team, the player's current team would have the right to refuse to let the players leave by matching the offer of the other team. *See id.* at 1296. If the player's current team did not refuse, then the other team would have to give the player's current team draft choices as compensation. *See id.* Another agreement was entered into in 1982, containing the same provisions. *See id.* In 1987, the 1982 agreement expired and the league continued to maintain the relationship with the players through a status quo under the terms of the old agreement. *See id.* The players went on strike and then filed a complaint in court alleging that the league violated antitrust law by maintaining the status quo. *See id.*

90. *See id.* at 1302. The court stated that "[t]he labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts." *Id.* at 1303. Further, the court explained that there are economic and legal tools which both the players and the league can use to achieve a resolution to their problem. *See id.* at 1302. The union has the economic tool to strike. *See id.* (citing NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962)). The

players should continue to bargain, resort to economic force or present their claims to the NLRB.[91] The court held that the nonstatutory labor exemption extends beyond impasse, and therefore, the league was not in violation of antitrust law.[92]

In 1995, the Second Circuit was again faced with the issue of whether the nonstatutory labor exemption applies after a collective bargaining agreement expires.[93] In *National Basketball Ass'n v. Williams*,[94] the Second Circuit held that "the nonstatutory labor exemption precluded an antitrust challenge to continued imposition of terms of expired collective bargaining agreement, after impasse was reached in negotiations."[95] In *Williams*, the employers sought declarations from the district court judgment, which held: (1) that the continued imposition of the disputed provisions of the CBA (collective bargaining agreement) would not violate the antitrust laws because such imposition falls under the nonstatutory exemption to the antitrust laws; and (2) that the disputed provisions are lawful even if the antitrust laws apply.[96] The court agreed with the employers.[97] The court noted its agreement with the United States Court of Appeals for the Eighth Circuit in *Powell v. National Football League*,[98] and held that the nonstatutory labor exemption "precluded an antitrust challenge to various terms and conditions of employment implemented after impasse."[99] The *Williams* court

employers, on the other hand, can lock out the union employees. *See id.* (citing American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965)). Legally, both parties can petition the NLRB seeking a "cease-and-desist order prohibiting conduct constituting an unfair labor practice." *Id.* (citing Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)).

91. *See id.* at 1303. The court strongly urged both parties to continue to bargain, and to resort to economic forces only if necessary. *See id.*

92. *See id.* at 1304. The court reversed the order of the district court and remanded the case with instructions to enter judgments for the defendants. *See id.* The court split on this holding, two to one. *See id.* at 1293.

93. *See* National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995).

94. *Id.*

95. *Id.* The court held that the antitrust laws "do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA (Collective Bargaining Agreement), or from using economic force to obtain agreement to those proposals." *Id.* at 693.

96. *See id.* at 685. The Southern District Court of New York ruled in favor of the National Basketball Association. *See id.* at 684. Williams appealed the dismissal of their counterclaim alleging that the National Basketball Association violated the antitrust laws by maintaining the terms in the expired collective bargaining agreement. *See id.* The Court of Appeals for the Second Circuit affirmed the district court decision. *See id.*

97. *See id.*

98. 930 F.2d 1293 (8th Cir. 1989).

99. *Id.* at 693 (citing *Powell*, 930 F.2d at 1293).

concluded that "the antitrust laws do not prohibit employers from certain actions."[100] The court found that limits on such employer action is found in labor laws.[101]

Several other appellate court decisions have created conflicting notions concerning the extent of the nonstatutory labor exemption and its application beyond impasse.[102] Opposing circuits have held that the nonstatutory labor exemption does not extend beyond impasse.[103] In *Smith v. Pro-Football,*[104] James Smith, a professional football player, brought an antitrust action against the Professional Football League and Club claiming that he was unable to negotiate a contract for the true value of his services because of the player selection draft.[105]

The football league and club argued that the National Football League (NFL) draft is a mandatory bargaining subject and therefore is exempt from antitrust liability under the nonstatutory labor exemption.[106] The district court held that the draft was an unreasonable restraint on trade and therefore subject to antitrust law

100. *Id.* The court held that the antitrust laws do not prohibit employers from "bargaining jointly with a union, from implementing their joint proposals in the absence of a collective bargaining agreement, or from using economic force to obtain agreement to those proposals." *Id.* at 693 (citing *Powell,* 930 F.2d at 1293).

101. *See id.* The court held that there was an "unspoken assumption"that multi-employer collective bargaining is not subject to antitrust law. *See id.* Further, the court held that any doubts about this unspoken assumption were resolved by the passage of the federal labor laws. *See id.*

102. *See* McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (concluding nonstatutory labor exemption applies where term of employment was incorporated into collective bargaining agreement as result of good faith, arm's length bargaining); Smith v. Pro-Football, 420 F. Supp. 738 (D.C. Cir. 1978) (finding football league actions anti-competitive and unreasonable, and therefore subject to antitrust liability); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (holding nonstatutory labor exemption cannot be involved where agreement is not product of bona fide negotiations).

103. *See supra* note 102.

104. 593 F.2d 1173 (D.C. Cir. 1978).

105. *See id.* at 1174-75. James Smith was drafted by the Washington Redskins in 1968 when he graduated from the University of Oregon. *See id.* at 1176. At the time Smith was drafted, the National Football League (NFL) had a "no-tampering"rule pertaining to the draft. *See id.* The rule stated that no team was allowed "to negotiate prior to the draft with any player eligible to be drafted, and no team could negotiate with (or sign) any player selected by another team in the draft." *Id.* Only one team had the right to negotiate with a given player. *See id.* Therefore, if the player could not reach an agreement with the team that had the exclusive right to negotiate with him, then the player could not play in the NFL. *See id.* He signed a contract with the Redskins. *See id.* Smith played for the Redskins until the last game of his first season, when he injured himself and was advised he should end his football career. *See id.* Two years after the injury, Smith filed suit. *See id.* at 1177.

106. *See* Smith v. Pro-Football, 420 F.Supp. 738, 741 (D.C. 1976) (arguing draft is mandatory collective bargaining subject under National Labor Relations Act).

challenges.[107] The *Smith* court thus concluded that the NFL draft was not exempt under the nonstatutory labor exemption.[108]

In 1979, in *McCourt v. California Sport*,[109] the Sixth Circuit also addressed whether the nonstatutory labor exemption extended beyond impasse.[110] McCourt, a professional hockey player, claimed that the National Hockey League reserve system was subject to, and in violation of, the antitrust laws.[111] The *McCourt* court applied the *Mackey* test to the collective bargaining agreement and found that the reserve system was incorporated into the collective bargaining agreement through bona fide arm's length bargaining.[112] The court held that because the reserve system was a product of good faith bargaining it was exempt from antitrust law under the nonstatutory labor exemption.[113]

The United States District Court for the District of New Jersey, in *Bridgeman v. National Basketball Ass'n*,[114] was the first court to de-

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107. *Id.* at 742. The court stated:

> [t]he policy of the exemption – allowing the collective bargaining process, proceeding unfettered by antitrust restraints, to determine wages, hours, and terms and conditions of employment – does not require and would not be served by extending the exemption to arrangements imposed unilaterally by employers, merely because such arrangements could at some time be settled upon through mandatory collective bargaining. The court held that the draft was an unreasonable restraint on trade and therefore subject to antitrust law challenges.

Id.

108. *See Smith*, 593 F.2d at 1187.

109. 600 F.2d 1193 (1979).

110. *See id.* at 1197. The court noted that while the United States Supreme Court has ruled that other professional sports are not exempt from antitrust law in the way that baseball is, it has never decided the issue of whether the reserve system in sports is a violation of the Sherman Act or whether the reserve system is a mandatory subject of collective bargaining and therefore exempt from the Sherman Act. *See id.* The reserve system provided a team, when one of its players became a free agent and signed a contract with a different team, to receive an "equalization payment"from the player's new team. *See id.* at 1195. The equalization payment was made "by the assignment of contracts of players, by the assignment of draft choices, or as a last resort, by the payment of cash." *Id.*

111. *See id.* at 1196.

112. *See id.* at 1203. The court, agreeing with the express findings of the district court but disagreeing with its decision, held that the inclusion of the reserve system in the collective bargaining agreement was the result of good faith bargaining. *See id.* The court, in addition to finding that the agreement met the third standard in the *Mackey* test (that the agreement was a result of bona fide arm's length bargaining) also held that the agreement met the standards set forth in the first two prongs of *Mackey*. *See id.* at 1198. For a discussion of the three prong *Mackey* test, *see supra* note 78 and accompanying text.

113. *See id.* at 1203. The court held that "[s]o viewed, the evidence here, . . . compels the conclusion that the reserve system was incorporated in the agreement as a result of good faith, arm's length bargaining between the parties." *Id.*

114. 675 F. Supp. 960 (D.N.J. 1987).

cide when the nonstatutory labor exemption ceases after the collective bargaining agreement expires.[115] The plaintiffs in *Bridgeman* brought a suit against the National Basketball Association (NBA) claiming that the enforcement by the league of the college player draft, salary cap and right of first refusal constituted antitrust violations.[116] The court, placing a limit on the duration of the nonstatutory labor exemption, held that after good faith bargaining, the nonstatutory labor exemption lasts for as long as the employer continues to impose the particular restraint and "reasonably believes that the practice or a close variant of it will be incorporated in the next [collective bargaining agreement]."[117] Once the employer's belief becomes unreasonable,[118] the restraint becomes unilateral, thereby failing the *Mackey* test.[119] A restraint that fails the *Mackey* test is subject to antitrust scrutiny.[120]

III. FACTS

In 1987, the collective bargaining agreement involving the terms and conditions of employment for all professional football players expired, and the National Football League (NFL) and National Football League Players Association (NFLPA) began negotia-

115. *See id.* at 965. *See also* Corcoran, *supra* note 26, at 1061 (noting that *Bridgeman* case was first to decide when nonstatutory labor exemption ends after collective bargaining agreement has expired); Daniel Nester, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. U.L.J. 123, 135 (1990) (stating that Bridgeman court was first to decide when nonstatutory exemption to antitrust law should expire).

116. *See Bridgeman*, 675 F. Supp. at 963. A collective bargaining agreement between the players and the NBA expired in 1980. *See id.* at 962. The 1980 agreement expired at the end of the 1986-87 season, but the terms of the agreement were to be maintained until a new agreement was made. *See id.* at 963. During negotiations for a new agreement, the parties were in dispute concerning the college draft and the right of first refusal. *See id.* After considerable negotiation, no agreement was reached. *See id.* The players then filed suit against the NBA claiming antitrust law violations because of the continued enforcement of certain terms after the collective bargaining agreement expired. *See id.*

117. *Id.* at 967. The court noted that "a time will come after expiration of the agreement when the practices that were included in the agreement can no longer be said to exist as an extension of the agreement. At such time, those practices are no longer protected by the labor exemption." *Id.* at 966. *See* Corcoran, *supra* note 26, at 1062 (stating that "[o]nce the employer's belief in reincorporation becomes unreasonable, both parties no longer consent to the restraint.").

118. *See* Corcoran, *supra* note 26, at 1062. The *Bridgeman* court found that as long as a restraint was expected to be in the next agreement, the restraint was still considered reasonable by both the union and the employers. *See id.*

119. *See Bridgeman*, 675 F. Supp. at 967. The court noted that when the employer no longer reasonably believes that the restraint will be included in the next agreement, the restraint is unreasonable and continued enforcement of it becomes a unilateral restraint subject to antitrust law. *See id.*

120. *Id.*

tions for a new collective bargaining agreement.[121] In 1989, while negotiations for a new agreement were still in session, the NFL owners adopted an amendment to the NFL Constitution establishing a new "Developmental Players Squad."[122] The amendment, known as Resolution G-2, departed from the customary NFL practice of setting player salaries through individual negotiations and instead established a fixed salary for Developmental Players.[123]

After tiresome negotiations between the NFL and NFLPA over Resolution G-2, the NFL Management Committee's Executive Director, Jack Dolan, and the NFLPA's Executive Director, Gene Upshaw, met to negotiate the terms and conditions of employment of the Developmental Squad Players.[124] The two directors could not agree on the fixed salary component of the agreement and the issue was "clearly at impasse."[125] The NFL owners, however, without NFLPA consent, implemented the Developmental Squad Players Program.[126]

On May 9, 1990, Anthony Brown and eight other Developmental Squad Players, on behalf of 235 of the Developmental Squad Players from the 1989 season, brought a class action lawsuit against all twenty-eight NFL clubs and the NFL.[127] Brown alleged that the NFL owners and the NFL violated the Sherman Act by setting a fixed salary for the Developmental Players Squad.[128]

The United States District Court for the District of Columbia held that the owners' unilateral action imposing the salary cap on the players violated antitrust laws.[129] The court enjoined the NFL

121. *See* Brown v. Pro Football, Inc., 116 S.Ct. 2116, 2119 (1996).

122. *See* Brown v. Pro Football, Inc., 50 F.3d 1041, 1046 (D.C. Cir. 1995). The developmental players squad was composed of practice and replacement players, in addition to the 47 players on the regular season roster. *See id.* The amendment allowed each club to maintain a developmental squad of rookie players, who have attended NFL training camp in a previous year but played in less than three regular season games. *See id.* at n.1.

123. *See id.* The Resolution did not establish the amount of the salary. *See id.*

124. *See id.*

125. *See id.* (citing Letter form Jack Dolan to Hugh Culverhouse et al. (June 16, 1989)).

126. *See id.* at 1047. The NFL implemented the program by sending uniform contracts for the developmental players to all teams. *See id.* All team officials were advised that paying any Developmental Player more or less than $1,000 per week would result in disciplinary action, with the threat of future loss of draft choices. *See id.*

127. *See Brown*, 50 F.3d at 1047.

128. *See id.*

129. *See id.* In June 1991, the District Court granted the player's motion for partial summary judgment and denied the NFL's cross-motion for summary judgment on the issue of whether the lawsuit was barred by the nonstatutory labor exemption to antitrust law. *See id.* (citing Brown v. Pro Football, Inc., 782 F. Supp.

and the owners from ever setting a uniform salary for any players.[130] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the district court holding and found that the owners acted lawfully when they imposed the fixed salary.[131] The appellate court concluded that the owners' actions were lawful because the nonstatutory labor exemption precluded liability under the antitrust laws.[132]

IV. NARRATIVE ANALYSIS

A. Majority Opinion

In *Brown v. Pro Football, Inc.*,[133] the United States Supreme Court was faced with the issue of whether either the nonstatutory labor exemption or antitrust law controls when the NFL owners, after collectively bargaining until impasse, imposed a fixed salary on the players.[134] Justice Breyer, writing for the majority,[135] began the analysis with a detailed look at the origin of the nonstatutory labor exemption.[136] The Court recognized that the nonstatutory labor exemption was implemented in order to resolve the conflict between labor policies favoring collective bargaining and antitrust policies favoring free markets.[137]

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125 (D.D.C. 1991)). In March 1992, the District Court granted the player's motion for summary judgment on the antitrust liability claim. *See id.* (citing Brown v. Pro Football, Inc., 1992-1 Trade Cas. P 69, 747 (D.D.C. 1992). In September 1992, the District Court held a jury trial on the issues of antitrust injury and damages. *See id.* The jury awarded damages to the players. *See id.* (citing Brown v. Pro Football, Inc., Civ. Action 90-1071 (D.D.C. Oct. 5, 1992) (judgment on the verdict).

130. *See id.* (citing Brown v. Pro Football, Inc., 1993-1 Trade Cas. P 70, 260 (D.D.C. 1993).

131. *See id.*

132. *See Brown*, 30 F.3d at 1047.

133. 116 S.Ct. 2116 (1996).

134. *See id.* at 2121. The *Brown* case is based on a conflict between federal labor law and antitrust law in the context of a dispute involving the professional football industry. *See id.* at 2116.

135. *See id.* Justice Breyer delivered the opinion of the Court, in which Justices Rehnquist, O'Connor, Scalia, Kennedy, Souter, Thomas and Ginsburg joined. *See id.* at 2118.

136. *See id.* at 2120. The Court noted that the nonstatutory labor exemption reflects Congress' intentions as established in the labor laws. *See id.* Further, the Court has implied this nonstatutory labor exemption from federal labor law statutes. *See id.* (citing 29 U.S.C. § 151; Teamsters v. Oliver, 79 S.Ct. 297, 304 (1959)).

137. *See id.* at 2120. The nonstatutory labor exemption, an implicit exemption, recognizes that in order to give full effect to both federal labor laws and collective bargaining, restraints on competition must be shielded from antitrust laws. *See id.* This nonstatutory exemption applies to both unions and employers. *See* Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3d Cir. 1974).

The Supreme Court held that the nonstatutory labor exemption, as a matter of labor law and policy, extends beyond impasse.[138] The Court noted that prior history shows that both the NLRB and the courts have applied the exemption after impasse, thereby allowing employers to unilaterally implement new employment terms.[139] The NLRB and the courts have allowed this implementation in multi-employer bargaining cases as well.[140] Justice Breyer found that to apply the antitrust laws in these situations

> would require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours and working conditions is to proceed - the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever.[141]

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138. *See Brown*, 116 S.Ct. at 2121. The Court concluded that the question before it was "one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer?" *Id.*

139. *See id.* (citing Storer Communications, Inc., 294 N.L.R.B. 1056, 1090 (1989); Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (CADC 1968)). An employer, however, must first bargain in good faith and the new terms of employment must be carefully circumscribed provisions. *See id.*

140. *See id.* at 2121-22 (citing Cuyamace Meats, Inc. v. Butchers' & Food Employers' Pension Trust Fund, 638 F. Supp. 885, 997 (SD Cal. 1986), *aff'd*, 827 F.2d 491 (9th Cir. 1987); El Cerrito Mill & Lumber Co., 316 N.L.R.B. 1005 (1995); Paramount Liquor Co., 307 N.L.R.B. 676, 686 (1992); NKS Distrib., Inc., 304 N.L.R.B. 338, 340-41 (1991), *rev'd*, 50 F.3d 18 (9th Cir. 1995); Sage Dev. Co., 301 N.L.R.B. 1173, 1175 (1991); Walker Constr. Co., 297 N.L.R.B. 746, 748 (1990), *enforced*, 928 F.2d 695 (5th Cir. 1991); Food Employers Council, Inc., 293 N.L.R.B. 333, 334, 345-46 (1989); Tile, Terazzo & Marble Contractors Ass'n., 287 N.L.R.B. 769, 772 (1987), *enforced*, 935 F.2d 1249 (11th Cir. 1991); Salinas Valley Ford Sales, Inc., 279 N.L.R.B. 679, 686, 690 (1986); Carlsen Porsche Audi Inc., 266 N.L.R.B. 141, 152-53 (1983); Typographic Serv. Co., 238 N.L.R.B. 1565 (1978); United Fire Proof Warehouse Co. v. N.L.R.B., 356 F.2d 494, 498-99 (7th Cir. 1966)).

The NLRB has also stated that the member clubs of the NFL "constitute a single employer for bargaining purposes." Brief for Respondent at 47, Brown v. Pro Football, 116 S.Ct. 2116 (1996) (No. 95-388) (quoting NFL Management Council, N.L.R.B. 958, 961 (1973)).

141. *Brown*, 116 S.Ct. at 2122 (citing Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed. 145 (1930) (discussing agreement to insert arbitration provisions in motion picture licensing pictures)).

The majority concluded that there was no plausible way antitrust law could be applied in a situation such as the one in *Brown*, where the employers imposed the salary cap after collective bargaining reached impasse.[142] The majority found that if the nonstatutory labor exemption expired at impasse, there would be no legal alternate actions for the employers to invoke.[143] If all of the employers had implemented terms similar to their last joint offer, they would be faced with an antitrust action.[144] The Court noted that if the employers had individually imposed terms which differed from their last offer in the collective bargaining discussions, they would be facing an unfair labor practice claim.[145] Further, had the employers met prior to or subsequent to impasse, they would have been faced with antitrust claims.[146] Justice Breyer described the employers as being caught in a "Catch 22," and no matter which way they turned, the employers would be in violation of either antitrust laws or labor laws.[147] Therefore, the Court concluded that "to permit antitrust liability here threatens to introduce instability and uncertainty into the collective bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective bargaining process invites or requires."[148]

In conclusion, the majority stated that the holding in *Brown* does not "insulate from antitrust review every joint imposition of terms by employers."[149] The majority however, held that there was no need in the present case to decide these "outer boundaries" which would be subject to antitrust review.[150] The Supreme Court

142. *See id.* at 2123. The majority held that labor law and the NLRB, not the antitrust courts, have primary responsibility for reviewing and implementing the collective bargaining process. *See id.*

143. *See id.*

144. *See id.* Under antitrust laws, employers imposing similar terms may be in violation of antitrust laws for their identical behavior tending to show a common understanding or agreement. *See id.*

145. *See id.*

146. *See Brown*, 116 S.Ct. at 2123. Justice Breyer stated that had the NFL owners met prior to impasse, the employers could have been charged with an antitrust claim alleging that they agreed to limit the kinds of actions they would take should impasse occur. *See id.* In addition, the players could have asserted the same antitrust claim if the owners had met after impasse, by claiming that the owners illegally agreed upon what action to take prior to renewed negotiations. *See id.*

147. *See id.*

148. *Id.*

149. *Id.* at 2127. The majority recognized that there may be instances where the agreement could be "distant"in time and under circumstances that would require antitrust intervention. *See id. See, e.g.*, El Cerrito Mill & Lumber Co., 316 N.L.R.B. 1005, 1006-07 (1995) (suggesting that "extremely long impasse would justify union withdrawal from group bargaining").

150. *See Brown*, 116 S.Ct. at 2127.

therefore concluded that the implicit (nonstatutory) labor exemption applied to the employers' conduct which had taken place during and immediately following collective bargaining.[151] The employers' conduct was directly related to the "lawful operation of the bargaining process, [i]t involved a matter that the parties were required to negotiate and it concerned only the parties to the collective bargaining relationship."[152]

The Developmental Squad Players argued to the Supreme Court that the nonstatutory labor exemption applies only to labor-management agreements and that the exemption must rest upon labor-management consent.[153] The Supreme Court rejected this argument and held that the exemption cannot be limited to only those understandings embodied in the collective bargaining agreement.[154] The majority defined the collective bargaining process as an ongoing process that involves the time period prior to and subsequent to the time in which the actual agreement is finalized.[155] Further, in a multi-employer bargaining process as is exemplified in *Brown*, there are many procedural and substantive understandings among the employers as well as within the union.[156] Therefore, the majority held that the exemption does not apply "only insofar as both labor and management consent to those understandings."[157]

In the amicus brief for players, the Solicitor General argued that the nonstatutory labor exemption should end at the point of impasse.[158] The basic premise of the Solicitor General's argument was that an employer (if not bound by antitrust law at the point of impasse) does not have a duty to act in good faith and can act inde-

151. *See id.*

152. *Id.*

153. *See id.* at 2123. The players argued that based on prior Supreme Court decisions, the labor exemption only applies to understandings within the collective bargaining agreement. *See id.* (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975)).

154. *See id.* at 2123.

155. *See Brown*, 116 S.Ct. at 2123.

156. *See id.*

157. *Id.* The majority held that this cannot possibly be the correct application of the exemption. *See id.* The majority noted that there are certain collective bargaining positions that the employer will maintain to which the unions should not consent, but which are exempt under the nonstatutory labor exemption. *See id.*

158. *See id.* at 2124. The Solicitor General argued that "employers no longer have a duty under the labor laws to maintain the status quo . . . [and] are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union." Brief for the United States of America at 17, Brown v. Pro Football, 116 S.Ct. 2116 (1996) (No. 95-388).

pendently.[159] The Supreme Court rejected this argument as well.[160] The Court held that an employer is not free to act independently after impasse[161] because labor laws limit an employer's alternatives once impasse occurs.[162] The majority also rejected the Solicitor General's argument because ending the exemption at impasse would cause antitrust courts to decide "the lawfulness of activities intimately related to the bargaining process," which was what the Court wanted to avoid.[163]

Additionally, the players argued that regardless of how the nonstatutory labor exemption applies in the normal labor law context, professional sports is unique and therefore the exemption should apply in a different way.[164] Although the majority considered the unique "interest, excitement or concern" in sports, the Court held that professional sports is not unique in respect to labor law and the nonstatutory labor exemption.[165] Therefore, the majority concluded that there was no satisfactory reason to distinguish football players from other organized workers.[166]

B. Dissenting Opinion

Justice Stevens, the sole dissenter, concluded that the majority opinion did not coincide with the labor laws and antitrust laws or with the congressional intent of the statutes from which the nonstatutory labor exemption is derived.[167] Justice Stevens found that

159. *See Brown*, 116 S.Ct. at 2124.

160. *See id.*

161. *See id.* The Court held that "[e]mployers . . . are not completely free at impasse to act independently. The multi-employer bargaining unit ordinarily remains intact; individual employers cannot withdraw." *Id.*

162. *See id.* The Court stated that there are four options available to an employer once impasse occurs: (1) maintaining status quo, (2) implementing the last offer, (3) locking out the workers, or (4) negotiating separate interim agreements with the union. *See id.* The majority found, however, that if the employers were to invoke these alternatives without the exemption in place, the employers would be subject to antitrust attack. *See id.*

Additionally, the Court questioned what would happen if the parties could not reach an interim agreement. *See id.* The Court concluded that if there is no interim agreement, uniform employer conduct would be likely to occur, which would then invite antitrust attack by the union. *See id.*

163. *Id.*

164. *See Brown*, 116 S.Ct. at 2126.

165. *Id.*

166. *See id.*

167. *See id.* at 2129 (Stevens, J., dissenting). Justice Stevens stated that in his view:

> neither the policies underlying the two separate statutory schemes, nor the narrower focus on the purpose of the nonstatutory exemption, provides a justification for exempting from antitrust scrutiny collective action

because of unique features within the *Brown* case,[168] the employers should not be entitled to an exemption from antitrust liability.[169] Justice Stevens determined that the employers acted solely out of competitive interests[170] because there was no dispute between the employers and the players as to the pre-existing principle that the players' salaries would be individually negotiated.[171] Justice Stevens argued that the only reason the employers imposed the fixed wage rate was to prevent certain owners from gaining an unfair advantage by "evading roster limits."[172] Finding that the employers' interests were competitive and not regulatory, Justice Stevens stated that the employers' anticompetitive actions should not be protected by the nonstatutory labor exemption.[173]

Justice Stevens concluded that the nonstatutory labor exemption is not automatically triggered merely because an antitrust challenge touches on an area of labor law contained in collective bargaining.[174] According to Justice Stevens, the majority failed to recognize Supreme Court precedent by finding that the types of

initiated by employers to depress wages below the level that would be produced in a free market.

Id. (Stevens, J., dissenting). Justice Stevens further stated that in his view, the majority opinion "glosses over"the unique feature of the case and misses the critical inquiry into whether labor law requires extension of the nonstatutory labor exemption to a case such as this. *Id.* (Stevens, J., dissenting).

168. *See id.* at 2130 (Stevens, J., dissenting). Justice Stevens concluded that there were three unique features to the *Brown* case that were critical to the inquiry of the Court. *See id.* (Stevens, J., dissenting). These features include: first, the sports market is unlike any other market because player salaries are individually negotiated; second, the employers imposed the wage restraint on the developmental squad players in order to force all owners to comply with the league-wide rules that limited the number of players; third, even though the employers notified the union that they were going to implement a uniform wage for the developmental squad players, the new wage standard was not bargained for between the parties but rather unilaterally implemented by the owners without union agreement. *See id.* (Stevens, J., dissenting).

169. *See Brown*, 116 S.Ct. at 2131 (Stevens, J., dissenting).

170. *See id.* (Stevens, J., dissenting).

171. *See id.* (Stevens, J., dissenting).

172. *Id.* at 2131 (Stevens, J., dissenting).

173. *See id.* (Stevens, J., dissenting) (citing Mine Workers v. Pennington, 381 U.S. 657, 667 (1965)). Justice Stevens recognized that the Court has previously held that "some collective action by employers may justify an exemption because it is necessary to maintain the 'integrity of the multi-employer bargaining unit.'" *Id.* (Stevens, J., dissenting) (quoting NLRB v. Brown, 380 U.S. 278, 289 (1965)). However, here Justice Stevens found that the actions by the employers were anticompetitive in nature. *See id.* (Stevens, J., dissenting) (citing *Pennington*, 381 U.S. at 667).

174. *See Brown*, 116 S.Ct. at 2132 (Stevens, J., dissenting). Justice Stevens rejected the majority's rationale that "almost any concerted action by employers that touches on a mandatory subject of collective bargaining . . . should be immune from scrutiny so long as the collective bargaining process is in place." *Id.* at 2131 (Stevens, J., dissenting).

disputes as in *Brown* are immune from antitrust laws.[175] Justice Stevens explained that the Supreme Court in *Mine Workers v. Pennington*[176] held that the exemption is not triggered merely because the antitrust action involves the area of collective bargaining.[177] Justice Stevens noted that the *Brown* majority attempted to reconcile *Pennington* at the close of its opinion when it stated that the nonstatutory labor exemption applies in *Brown* because the employers' action "grew out of, and was directly related to, the lawful operation of the bargaining process . . . . It involved a matter that the parties were required to negotiate collectively . . . . And it concerned only the parties to the collective bargaining relationship."[178] Justice Stevens, in conjunction with the majority, recognized that the *Brown* case, unlike *Pennington*, involved the parties to the collective bargaining agreement.[179] He reconciled this difference by explaining that the difference between *Brown* and *Pennington* does not affect the relevant analysis applied by the Court in *Pennington* to determine whether the nonstatutory labor exemption applies.[180] The *Pennington* analysis requires a court to undertake "a detailed examination into whether the policies of labor law so strongly supported the agreement struck by the bargaining parties that it should be immune from antitrust scrutiny."[181] Justice Stevens concluded that the majority, ignoring the *Pennington* analysis, wrongfully concluded that the exemption should apply merely because the employers' actions were implemented during the lawful collec-

175. *See id.* at 2132 (Stevens, J., dissenting). Justice Stevens recognized that Supreme Court precedent supports the notion that antitrust courts should be kept out of the collective bargaining process. *See id.* (Stevens, J., dissenting). He found that the precedent subscribing to this notion does not justify the majority's conclusion "that employees have no recourse other than the Labor Board when employers collectively undertake anticompetitive action. In fact, they contradict it." *Id.* (Stevens, J., dissenting) (citing *Pennington*, 381 U.S. at 663 (holding that mere fact that antitrust challenge touches on issue that is subject to collective bargaining does not mean nonstatutory labor exemption is automatically triggered)).

176. 381 U.S. 657, 663 (1965).

177. *See Brown*, 116 S.Ct. at 2132 (Stevens, J., dissenting) (citing *Pennington*, 381 U.S. at 664).

178. *Brown*, 116 S.Ct. at 2126-27.

179. *See id.* at 2132 (Stevens, J., dissenting). Justice Stevens recognized that in *Pennington*, unlike *Brown*, the employers actions affected more than just the parties to the agreement. *See id.* (Stevens, J., dissenting).

180. *See id.* (Stevens, J., dissenting). Justice Stevens explained that even though the circumstances surrounding *Brown* and *Pennington* differed, the analysis used in *Pennington* was still applicable in *Brown* because it deals with whether the exemption is applicable. *See id.* (Stevens, J., dissenting).

181. *Id.* (Stevens, J., dissenting) (citing *Pennington*, 381 U.S. at 664-65). Justice Stevens saw this analysis as the "basic analysis"for a court to follow when determining whether the nonstatutory labor exemption applies. *Id.* (Stevens, J., dissenting).

tive bargaining process.[182] He further concluded that the majority's rationale constitutes an "unprecedented expansion" of the nonstatutory labor exemption.[183]

Justice Stevens rejected the majority's contention that prior caselaw supports its rationale.[184] He rejected the majority's reliance on *Amalgamated Meat Cutters v. Jewel Tea,*[185] stating that the Court in *Jewel Tea* was only concerned with the question of whether the nonstatutory labor exemption applies to an agreement between an employer and a union.[186] Justice Stevens stated that in *Jewel Tea,* Justice White (also the author of the *Pennington* opinion) explained that the Court must analyze the bargaining process and decide whether it should be subject to antitrust scrutiny.[187] Justice Stevens found that the *Jewel Tea* case establishes that the "crucial determinant" in determining whether the exemption applies is not what the terms are but rather the impact that the agreement will have on the market and the interests of the union members.[188] He found no language in *Jewel Tea* stating that the exemption applies merely because an antitrust action arises out of the collective bargaining process.[189]

Justice Stevens, rejecting the majority's reasoning supporting the applicability of the nonstatutory labor exemption agreed with the District Court holding and stated that:

> [b]ecause the developmental squad salary positions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the nonstatutory labor exemption for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply.[190]

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182. *See id.* at 2132 (Stevens, J., dissenting).

183. *Id.* (Stevens, J., dissenting). Justice Stevens found that the Court's analysis not only expanded the exemption, but that it also repudiated the reasoning in "a prior, unconstitutional decision that Congress itself had not seen fit to override." *Id.* (Stevens, J., dissenting).

184. *See Brown,* 116 S.Ct. at 2132 (Stevens, J., dissenting).

185. 381 U.S. 676 (1965).

186. *See Brown,* 116 S.Ct. at 2133 (Stevens, J., dissenting).

187. *See id.* (Stevens, J., dissenting) (citing *Jewel Tea,* 381 U.S. at 688-97).

188. *Id.* at 2132-33 (Stevens, J., dissenting) (citing *Jewel Tea,* 381 U.S. at 690).

189. *See id.* at 2132 (Stevens, J., dissenting).

190. *Id.* at 2135 (Stevens, J., dissenting) (citing Brown v. Pro Football, 782 F.Supp. 125, 139 (D.D.C. Cir. 1991)).

He found that extending the nonstatutory labor exemption to shield the NFL from antitrust law infringes on the union's freedom to contract and contradicts the very purpose of the antitrust exemption and labor law.[191] Justice Stevens concluded that the majority's opinion forces labor unions to accept terms that they would never agree to initially because the employers may unilaterally impose employment terms, which violate antitrust law, without the threat of antitrust liability.[192]

V. CRITICAL ANALYSIS

Brown v. Pro Football, Inc.[193] is one of many recent cases involving the nonstatutory labor exemption in professional sports.[194] The *Brown* Court examined the history of antitrust law and federal labor law and determined that the nonstatutory labor exemption is applicable even after collective bargaining reaches the point of impasse.[195] In doing so however, the *Brown* Court failed to recognize: the purpose of the nonstatutory labor exemption and the purpose of the NLRA.

A. Purpose of Nonstatutory Labor Exemption

The *Brown* decision fails to follow precedent established by the Supreme Court concerning the applicability of the nonstatutory labor exemption. In *Connell Construction v. Plumbers & Steamfitters Local 100*,[196] the Supreme Court explained that the nonstatutory labor exemption has its source in strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.[197] The Supreme Court in *Connell* realized the need for the nonstatutory labor exemption because of the conflicting interests between the congressional policy favoring collective bargaining and the congressional policy favoring free competition in business.[198] In *Brown*, however, the majority disregarded the fact that the nonstatutory labor exemption was established as a solution

191. *See Brown*, 116 S.Ct. at 2135 (Stevens, J., dissenting).

192. *See id.* (Stevens, J., dissenting).

193. 116 S.Ct. 2116 (1996).

194. *See id.*

195. *See id.* (stating that National Football League was lawfully permitted to impose unilateral restraints on players, because it was legitimate means to settle dispute).

196. 421 U.S. 616 (1975).

197. *See id.* at 689.

198. *See id.* at 622 (holding Supreme Court has realized that "labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions").

to conflict, with one side of the conflict being the negotiating parties' collective bargaining interests.[199] The *Brown* Court, by extending the nonstatutory labor exemption beyond impasse, allowed the employer to impose unilateral restraints outside of the collective bargaining process without fear of antitrust violation.[200] However, at impasse there is no collective bargaining occurring, and as a result, there is no conflict between the congressional policy favoring collective bargaining and the antitrust policy.[201] Therefore, under the Supreme Court precedent set in *Connell*, the *Brown* Court overextended the application of the nonstatutory labor exemption by allowing the exemption to apply where it was not intended to apply.

The *Brown* decision also fails to recognize that a goal of the judiciary is to avoid intervening in the collective bargaining process, and to leave negotiations and settlement to the employers and the union.[202] The NLRA establishes the boundaries within which employers and unions may lawfully act in reaching a collective bargaining agreement.[203] The *Brown* Court, however, decided to increase the employer's protections, in relation to antitrust law, by extending the nonstatutory labor exemption beyond the point of impasse. The nonstatutory labor exemption was created out of "strong labor policy favoring association of employees to eliminate competition over wages and working conditions."[204] The *Brown* decision, however, extends protection to the employers to associate in order to eliminate competition in negotiating employee wages. In the *Brown* case, the employers imposed a fixed salary, even though

199. *See Brown v. Pro Football*, 116 S.Ct. 2116 (1996); Connell Constr. v. Plumbers and Steamfitters Local 100, 421 U.S. 616 (1975); 29 U.S.C. § 158(d)(1994).

200. *See* 29 U.S.C. § 158(d)(1994). Under this section collective bargaining is defined as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." *Id.*

201. *Compare* Connell Constr. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975)(realizing need for nonstatutory labor exemption because of conflict involving collective bargaining process) *with* Brown v. Pro Football, 116 S.Ct. 2116 (1996)(allowing nonstatutory exemption to apply after point of impasse, where there is no collective bargaining interest).

202. *See* Corcoran, *supra* note 26, at 1065 (stating that courts should not get involved in settlement of collective bargaining disputes between employers and unions, but rather should let both parties resolve problem).

203. *See* 29 U.S.C. § 158 (1994).

204. *Connell*, 421 U.S. at 622.

there was no dispute over the pre-existing individual negotiations.[205]

Lastly, the *Brown* decision applies the nonstatutory labor exemption to a unilateral action, which contradicts the Supreme Court's basis for establishing the nonstatutory exemption.[206] The Supreme Court recognized that the process of collective bargaining, a bilateral action, needed protection from antitrust law.[207] Thus, in *Brown*, once bargaining reached impasse, the employers actions became unilateral and therefore should have been analyzed under the *statutory labor exemption.*[208]

B. Purpose of the NLRA

The *Brown* Court's broad interpretation of the nonstatutory labor exemption is inconsistent with the Supreme Court's interpretation of the NLRA.[209] The NLRA provides economic weapons for both employers and unions to be used in the bargaining process and negotiations to reach a new agreement.[210] The Supreme Court has held that the basic purpose of the NLRA was that "through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading . . . to mutual agreement."[211]

The *Brown* decision extends the employer's permitted actions under the NLRA to include an antitrust exemption. The *Brown* Court, with no legislative history to support it, extended the nonstatutory labor exemption simply because the negotiations involved a compulsory subject of collective bargaining. In *Brown*, the Court failed to undertake a review of the policies surrounding the NLRA, and instead decided to extend this limited exemption. Had Congress wanted to exempt the employer from antitrust law after impasse, so that the employees would have to strike as their only

205. *See* Brown v. Pro Football, Inc. 116 S.Ct. 2116 (1996) (holding NFL was free to impose restraints once at point of impasse, thereby ending bargaining).

206. *See* Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (holding nonstatutory labor exemption needed to shield agreed-upon restraints, bilateral actions between employers and unions, concerning mandatory bargaining subjects).

207. *See id.* at 689.

208. *See id.*

209. *See* H.K. Porter v. NLRB, 397 U.S. 99, 103 (1970) (stating that NLRA "declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions."). For a discussion of the National Labor Relations Act, *see supra* notes 59-63 and accompanying text.

210. *See H.K. Porter*, 397 U.S. at 103.

211. *Id.*

means of bargaining for their salaries, the NLRA would have provided for it.[212]

The Supreme Court has held that through collective bargaining, the employer and employee should reach an agreement. Yet, the *Brown* court does not follow this Supreme Court precedent.[213] Congress expressly included mandatory collective bargaining in the NLRA.[214] The *Brown* Court, though, allows employers to unilaterally impose a restraint on players which is a mandatory bargaining subject under the NLRA.[215]

VI. IMPACT

The *Brown* decision, allowing employers to impose unilateral restraints on employees once collective bargaining reaches impasse, severely inhibits the collective bargaining process. The Court's broad interpretation of the nonstatutory labor exemption has serious ramifications on union/employer relations in the professional sports industry.

The *Brown* decision creates a disincentive for both employers and unions to collectively bargain. The collective bargaining process is intended for unions and employers to negotiate and reach an acceptable agreement as to the terms and conditions of employment.[216] The *Brown* Court's application of the nonstatutory labor exemption allows employers to dictate and enforce the employer's terms and conditions, restraining competition. The employers have no incentive to negotiate with the players in order to reach an agreement, because once negotiations reach impasse, the employers can impose unilateral restraints on the players without a fear of antitrust liability.[217] The employers can lawfully restrain competition, even if the players do not agree to the terms. The unions similarly have no incentive to bargain because the employers can

212. *See Brown*, 116 S.Ct. 2116 (1996).

213. *Compare* H.K. Porter v. NLRB, 397 U.S. 99, 101 (1970) (emphasizing that "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the terms of the contract.") *with* Brown v. Pro-Football, Inc., 116 S.Ct. 2116 (1996) (allowing employers to settle agreement without bargaining).

214. *See* 29 U.S.C. § 158(d) (1994). For the text of § 158, see *supra* note 59 and accompanying text.

215. *See* 116 S.Ct. 2116 (1996).

216. *See* 29 U.S.C. § 158 (d) (1994). For the text of § 158, see *supra* note 59 and accompanying text.

217. *See Brown*, 116 S.Ct. at 2119.

do what they want after impasse. The players know that the employers are merely mechanically negotiating, having no intention of reaching an agreement.[218]

This lack of incentive for collective bargaining deprives the professional sports players of certain rights provided by the NLRA.[219] The NLRA states that it is unfair labor practice for an employer to restrain employees in the exercise of their rights provided under section 157.[220] Also, employees have the right to refuse employers' terms or conditions not included in a current collective bargaining agreement.[221] The *Brown* Court, though, deprives the employees of this right of refusal. The *Brown* court gives the employers the power to restrain competition and impose non-negotiable terms upon players without their consent, and limits the players to strike as their only retaliation against the salary cap.

The *Brown* Court's broad interpretation of the nonstatutory labor exemption is inconsistent with both congressional policies of antitrust laws, established and maintained for over a hundred years, and the NLRA, established and maintained for almost fifty years. Extending the nonstatutory labor exemption beyond impasse tips the scales of the collective bargaining process in favor of the employers, thereby circumventing the collective bargaining process altogether. The *Brown* decision may lead to the end of collective bargaining in professional sports, which will eventually lead to the destruction of the professional sports industry. Players are not going to be willing to work in an industry where they have no power or bargaining rights against the employer concerning employment terms and conditions, and where the employers are not subject to scrutiny for their unilateral anti-competitive actions. In order to maintain order in the professional sports industry, the nonstatutory labor exemption must end at the point of impasse. Both employers and employees must be forced to use bargaining weapons provided under the NLRA to reach a collective bargaining agreement.

Denise K. Bryant

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218. *See* Brown v. Pro Football, Inc., 30 F.3d 1041, 1064 n.6 (Ward, J., dissenting) (quoting K-Mart Corp. v. NLRB, 626 F.2d 704, 706 (9th Cir. 1980)) (stating that "[a] related concern is that some employers may be embodied to go beyond hard bargaining and engage in 'surface bargaining, merely, going through the motions of negotiating'").

219. *See* 29 U.S.C. § 158 (d) (1994). For the text of § 158, *see supra* note 59 and accompanying text.

220. *See* 29 U.S.C. § 157.

221. *See id.*